COLUMBIA LAW REVIEW.

Published monthly during the Academic Year by Columbia Law Students.

SUBSCRIPTION PRICE, $2.00 PER ANNUM. 30 CENTS PER NUMBER.

NOTES.

THE NORTHERN SECURITIES DECISION.—By the unanimous judgment of four United States Circuit Court judges, the acquisition by the Northern Securities Company of a majority of the stock of the Northern Pacific and Great Northern railways, in pursuance of an agreement between their warring stockholders, has been held to conflict with the Anti-Trust Act of 1890. *United States* v. *Northern Securities Co. et al.* (C. C., D. Minn. 1903) 120 Fed. 721.

The first section of that Act provides that "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations is hereby declared to be illegal." The United States Supreme Court has decided definitely that the Act of 1890 prohibits all combinations in restraint of trade whether reasonable or unreasonable, *U. S.* v. *Trans-Missouri Freight Ass'n* (1897) 166 U. S. 290; and that as so interpreted the Act is constitutional, *U. S.* v. *Joint Traffic Ass'n* (1898) 171 U. S. 505. The only question is, therefore, whether we have here a contract or combination in restraint of trade.

In the first place it is clear that the present case is easily distinguishable from any of the preceding cases decided by the Supreme Court. In *U. S.* v. *Trans-Missouri Freight Ass'n, supra,* the agreement entered into by the defendants recited that it was "for the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations." The agreement in *U. S.* v. *Joint Traffic Assn. supra,* was almost identical in terms. In *Addyston Pipe & Steel Co.* v. *U. S.* (1899) 175 U. S. 211, the petition charged that defendants entered into a combination and conspiracy among themselves by which they agreed that there should be no competition between them in any of the States or territories mentioned in the agreement. In each of these cases, therefore, there was an agreement between corporations engaged in interstate commerce under which rates were to be fixed. In the Northern Securities

case there was no agreement to fix rates, nor were the corporations engaged in interstate commerce themselves parties to the agreement. The agreement was entered into by their stockholders and was, not to fix rates, but to organize a new corporation—the Northern Securities Company—and then sell to it their stock in sufficient quantities to enable that corporation to elect as directors of the Northern Pacific and Great Northern respectively, men who would manage the two roads in harmony. In each of the preceding cases competition had been directly destroyed by the agreement. In the principal case, on the contrary, the Northern Pacific and Great Northern railways are still independent corporations with independent boards of directors unfettered by any binding contract as to rates or division of traffic, and influenced merely by the moral suasion of the voting power of the Northern Securities Company. It would seem, therefore, that the Supreme Court could consistently with the actual decisions in the preceding cases arising under this Act, hold that there was here no direct restraint of trade.

It remains to be seen, therefore, whether or not the decision of the Circuit Court is justified by the spirit and reasoning of these earlier cases. The court contends that "it will not do to say, that so long as each railroad company has its own board of directors, they operate independently and are not controlled by the owner of the majority of their stock." In *Pullman Palace Car Co.* v. *Missouri Pacific Railway* (1885) 115 U. S. 587, at p. 596, the court per WAITE, C. J., uses the following language: "The two roads are substantially owned by the same persons and operated in the same interest, but that of the St. Louis, Iron Mountain & Southern Company is in no legal sense controlled by the Missouri Pacific;" and again (p. 597) "The Missouri Pacific has bought the stock of the St. Louis, Iron Mountain & Southern Company, and has effected a satisfactory election of directors, but this is all. It has all the advantages of a control of the road, but that is not in law the control itself. Practically it may control the company, but the company alone controls its road" Nor is the case of *Pearsall* v. *Great Northern* (1896) 161 U. S. 646, relied on by the court in the Northern Securities case, when closely examined inconsistent with the Pullman case. It was there held that under a State statute prohibiting any railroad corporation from "purchasing or in any other way becoming the owner of or controlling" any competing railroad corporation or the stock, franchises or rights of property thereof, an arrangement by which stock of the Northern Pacific should be transferred to the stockholders of the Great Northern in consideration of the guaranty by the Great Northern itself of the bonds of the Northern Pacific, was illegal. The decision was put on the express ground that the Great Northern was to be considered beneficial owner of the stock, for otherwise its guaranty of the Northern Pacific bonds would be without benefit to itself and therefore *ultra vires* (p. 871). Indeed the court declared (pp. 671–2) that "Doubtless these stockholders could lawfully acquire by individual purchases, a majority or even the whole of the stock of the reorganized company and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests as such in common."

Unless the Supreme Court is ready to restrict the technical but logical doctrine of the Pullman Case, it is hard to see how the decision of the lower court can be sustained. The gist of the wrong prohibited by the Act is the power to destroy competition. If Chief Justice Waite was right, when he said in *Pullman Car Co.* v. *Mo. Pac.* that the majority stockholder has no legal control of the corporation, then the Northern Securities Company has not in the legal sense, such control over the Northern Pacific and Great Northern as to give it power to destroy competition. As suggested in that case at p. 597, "the directors might act contrary to the wishes of the" Securities Co. in which case that company would "have no power to prevent it except by the election, at the proper time and in the proper way, of other directors."

The Supreme Court, however, may well adopt the view of the lower court which has already been enunciated by the highest courts of New York, Illinois and other States, *Farmers' Loan & Trust Co.* v. *N. Y. & N. R. Co.* (1896) 150 N. Y. 410, 425; *Chicago Union Traction Co.* v. *City of Chicago* (Ill. 1902) 65 N. E. 470, restrict the Pullman case to the use of the word "control" in a private contract, and declare that where the question is one of the evasion of a public duty or law, the court will recognize that a corporation is, in fact, ultimately controlled by its stockholders. See 3 COLUMBIA LAW REVIEW 203. The Supreme Court has declared in *Pearsall* v. *Great Northern*, that "whether the consolidation of competing lines will necessarily result in an increase of rates, or whether such consolidation has generally resulted in a detriment to the public, is beside the question. Whether it has that effect or not, it certainly puts it in the power of the consolidated corporation to give it that effect, in short, puts the public at the mercy of the corporation." And they may very well say now that whether the action of the Northern Securities Company will necessarily result in an actual restraint of trade or not, it has certainly put it in the power of the corporation to elect subservient directors of the two railroads with the result that competition between them will be at an end. Such a decision would doubtless correspond with the actual facts of the case and where public interests are involved corporate fictions or strictly logical conclusions are not always favored by the courts.

Such a decision by the Supreme Court would, however, be a distinct step in advance, and its results would be far reaching. If a corporation cannot, in pursuance of an agreement, legally acquire a majority of the stock of two competing corporations engaged in interstate commerce, it must follow that the right of a natural individual to buy stock is likewise restricted. The indeterminate life of the holding company and the fact that the owner of fifty-one per cent. of its stock can thereby control the competing roads with but half the capital necessary if he were to purchase the stock direct, are arguments to be considered by Congress if a different rule for corporation and natural individual is demanded. As the law now stands, however, the courts can make no such distinction, for competition would be destroyed in the one case as effectively as in the other.

The further question then presents itself whether the stock must be acquired in pursuance of an agreement. If A owning a majority

of the stock of the X railroad and a minority of the stock in the competing Y railroad, of his own initiative, buys enough more stock in the Y road to give him control of that; or if he acquires by operation of law enough more shares to give him such control, is he guilty of an illegal restraint of trade? Competition is just as effectively destroyed. These and other questions, presented more fully in Mr. Randolph's article, 3 COLUMBIA LAW REVIEW 168, 221, 298, will have to be determined if the decision in the Securities case is affirmed by the Supreme Court.

LIABILITY OF A MEMBER OF AN UNINCORPORATED CLUB.—Courts of law, voicing the common understanding of men, have always recognized the essential difference between the legal relations of men voluntarily organized for social purposes into a society or club and those associated for pecuniary profit. It is in this particular among others that a club differs so materially from a partnership. *Lindley on Partnership* 6th Ed. p. 13. It is clear that a member of a club does not by the act of joining constitute the trustee or the committee of the club his agents for the purpose of contracting debts. *Todd* v. *Emly* (1841) 8 M. & W. 505. By the payment of his initiation fee and dues he acquires a privilege, the right to enjoy the club premises. His dues with those of all the members constitute a fund from which within their authorized powers the trustees or committee managing the club may draw for the purpose of defraying expenses. If this fund will not be sufficient for a contemplated outlay it is their duty, suggests Lord Abinger C. B. in *Flemyng* v. *Hector* (1836) 2 M. & W. 172, to call on the members for further subscriptions. In the case cited an action was brought by Flemyng, a wine merchant against Hector a member of the defunct Westminster Reform Club. The defendant had never dealt with the plaintiff but it was in evidence that he had frequently been heard to call for Flemyng's wine. It was held, after full consideration by the whole court that there was no agency either by prior authorization or subsequent ratification, that the fact of membership carried with it no idea of principal and agent, and that if the plaintiff relied on such agency he must prove it as he would any other fact. The interest of a member in the property of the club seems to be at most an inchoate right to a proportionate share of the assets on dissolution and even this he loses when he ceases to be a member. *In Matter of St. James Club* (1852) 2 D. M. & G. 382. His interest seems to be little more than a license revocable for cause, *Hopkinson Marquis of Exeter* (1867) L. R. 5 Eq. 63, neither assignable, transmissible nor descendible. In brief, the nature of a member's interest, the character of a club and the common acceptation of a member's obligation by the world at large, all tend to negative any liability beyond that for the stated dues and assessments provided for by the rules of the Club.

This conception of a club member's freedom from liability founded as it is, on the tacit understanding of all men has been found sufficient to govern the application of an established rule of law in the recent case of *Wise* v. *Perpetual Trustee Co.* (1903) 72 L. J. P. C. 31. In that case the plaintiff as administrator of the estate of one of the trustees of the New South Wales Club, sought from the defendant,